

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

*In the Matter of*

ALLIANCE CONTACT SERVICES; AMERICALL GROUP,  
INC.; AMERICAN BANKERS ASSOCIATION; AMERICAN  
BREAST CANCER FOUNDATION; AMERICAN FINANCIAL  
SERVICES ASSOCIATION; AMERICAN RESORT  
DEVELOPMENT ASSOCIATION; AMERICAN  
TELESERVICES ASSOCIATION; AMERICA'S COMMUNITY  
BANKERS; ANSWER NET NETWORK; CANCER  
RECOVERY FOUNDATION OF AMERICA; CONNEXTIONS;  
DIRECT MARKETING ASSOCIATION; EFFECTIVE  
TELESERVICES, INC.; FREEEATS.COM, INC. D/B/A  
CCADVERTISING; HUMANE SOCIETY OF GREATER  
AKRON; INFOCISION MANAGEMENT CORP.; KIDS WISH  
NETWORK; MIRACLE FLIGHTS FOR KIDS; MULTIPLE  
SCLEROSIS ASSOCIATION OF AMERICA; NATIONAL  
CHILDREN'S CANCER SOCIETY; NOBLE SYSTEMS CORP.;  
NORTHWEST DIRECT MARKETING, INC.; NPS; OPTIMA  
DIRECT, INC.; PRECISION RESPONSE CORP.; SITEL  
CORP.; SOUNDBITE COMMUNICATIONS, INC.; SYNERGY  
SOLUTIONS, INC.; TELE-RESPONSE CENTER, INC.;  
TELETECH HOLDINGS, INC.; TPG TELEMAGEMENT,  
INC.; AND WEST BUSINESS SERVICES, LP

Petition for Declaratory Ruling that the FCC has  
Exclusive Regulatory Jurisdiction Over Interstate  
Telemarketing

CG Docket No. 02-278  
DA 05-1346

**REPLY COMMENTS OF INTERSTATE SELLERS AND TELESERVICES PROVIDERS**

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## TABLE OF CONTENTS

INTRODUCTION .....	2
SUMMARY .....	2
ARGUMENT	
I.    A Ruling That The FCC Has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing Will <u>NOT</u> Prevent States From Exercising Their Police Powers.....	4
II.   The FCC's Exclusive Regulatory Jurisdiction Over Interstate Telemarketing Is Firmly Established; Arguments To The Contrary Are Not Sustainable. ....	6
CONCLUSION .....	9

## INTRODUCTION

The companies listed on pages 9-11 (“Interstate Sellers and Teleservices Providers”; ISTPs) submit these Reply Comments in support of the Petition for Declaratory Ruling (“Joint Petition”) filed with the Commission on April 29, 2005 by thirty-two companies, charities and trade associations. The Reply Comments address comments submitted by the National Association of Attorneys General (“NAAG”) and the state of Indiana (“Indiana”) in opposition to the Joint Petition.<sup>1</sup>

## SUMMARY

The comments submitted by NAAG and by Indiana (whose Attorney General is President of NAAG) seriously misstate both the fundamental goal of the Joint Petition and the effect of the FCC ruling it seeks: That the Commission has exclusive regulatory jurisdiction over interstate telemarketing. These misstatements are central to the states’ argument that they have authority to regulate interstate telemarketing in any manner they choose, and to enforce their state telemarketing laws against interstate telemarketers.

Specifically, NAAG and Indiana assert – incorrectly – that the Joint Petition requests the FCC to rule that it has exclusive authority over all business-to-consumer interstate telephone calls, and that states have no authority to protect consumers from any harm that might come from such calls. These assertions mischaracterize the goal of the Joint Petition, which is, in fact, to obtain a ruling that allows them to operate under a uniform nationwide regulatory scheme, as Congress intended when it enacted the TCPA. Let there be no mistake: there is not – and has never been – any desire or intent on the part of the Joint Petitioners (or the ISTPs) to weaken or evade the appropriate application of state police powers to prosecute fraud, deception and other illegal or tortious conduct, regardless of whether that conduct occurs via interstate telephone calls. Such prosecutions are pursued today, as they have been

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<sup>1</sup> References to comments submitted by NAAG: “NAAG, p. \_\_\_”; and by Indiana: “IN, p. \_\_\_”.

for decades, pursuant to precisely the laws of general applicability that Congress saved from federal preemption in section 227 of the TCPA.

Notwithstanding section 227, NAAG and Indiana contend that issuance of the ruling sought in the Joint Petition would prevent states from protecting their citizens from fraud, deception, harassment, and other illegal and tortious acts committed via interstate telephone calling. Again, NAAG and Indiana misstate the effect of an FCC ruling that it has exclusive jurisdiction over interstate telemarketing. The TCPA applies – and the FCC’s jurisdiction extends – to legitimate telemarketing practices that involve truthful, non-misleading, commercial speech that, as Congress clearly recognized, is entitled to constitutional protection under *Central Hudson* (447 U.S. 557 (1980)). And the TCPA makes clear that states’ ability to protect their citizens from fraud, etc., is unimpaired by the grant to the FCC of exclusive authority to regulate interstate telemarketing.

In summary, NAAG and Indiana have adopted an “all or nothing” approach, contending that if the FCC claims exclusive jurisdiction over interstate telemarketing, then it also assumes – to the exclusion of the states – responsibility for protecting consumers nationwide from any harmful acts that happen to be committed via interstate telephone. This contention is but another way of positioning the states’ true contention: If state police powers extend to fraud, deception, etc., committed via interstate telephone calling, then they also extend to interstate telemarketing calls. Their fundamental objective is to eliminate, for jurisdictional and regulatory purposes, any distinction between (a) legitimate interstate telemarketing involving constitutionally protected commercial speech, and (b) fraudulent, deceptive, etc., acts and practices that happen to be committed via interstate telephone calls. Neither precedent nor policy support the position NAAG and Indiana are propounding.

The above contentions form the backdrop for other arguments that are advanced for the purpose of justifying state regulation of interstate telemarketing, one of which is that neither section 2 of the Communications Act nor section 227 of the TCPA confer upon the FCC exclusive regulatory

jurisdiction over interstate telemarketing, and that, on the contrary, the states have full jurisdiction over interstate telemarketing, and could prohibit it entirely if they so choose.

The foregoing argument has been advanced and rebutted throughout the proceedings in this Docket. It is time for the Commission to reject it once and for all.

## **ARGUMENT**

### **I. A Ruling That The FCC Has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing Will NOT Prevent States From Exercising Their Police Powers**

NAAG and Indiana make assertions about the purpose of the Joint Petition that are simply wrong. NAAG asserts that the Joint Petitioners are requesting the Commission “to declare that only the FCC, and not the states, may protect consumers from telephone calls that cross state lines” (NAAG, p. 2). And Indiana contends that the Joint Petition requests the Commission “to declare that only the FCC, and not the States, may impose consumer protection regulations on calls that cross state lines.” (IN, p.1). These assertions are incorrect. The Joint Petition addresses only state regulations affecting interstate “telephone solicitations,” involving truthful, non-misleading, commercial speech that is entitled to First Amendment protection under *Central Hudson*.

The Joint Petition does not seek a ruling that would infringe on the states’ police powers. Most of the Joint Petitioners are interstate telemarketers, and both they and the Interstate Sellers and Teleservices Providers are law-abiding corporate citizens, engaged only in legitimate telemarketing activities. They are not seeking to weaken or evade state laws that protect consumers from fraud, deception, and other unfair business practices. On the contrary, they fully support state enforcement efforts against interstate telemarketing fraud, as illegal telemarketing activity harms their current and prospective customers and damages the reputation of legitimate sellers and teleservices providers.

The sole, fundamental goal of the Joint Petitioners is to engage in interstate telemarketing in

accordance with uniform regulatory standards, as Congress envisioned and intended when it enacted the TCPA.

Having mischaracterized the goal of the Joint Petition, NAAG also misstates the effect of an FCC ruling that it has exclusive jurisdiction over interstate telemarketing. Painting a nightmare consumer protection scenario, NAAG asserts:

If firms could simply avoid state do-not-call laws by conducting their business over interstate telephone lines, they could similarly avoid enforcement of all state consumer protection laws. In such a world, there would be no stopping, without federal intervention, the *fraud, harassment, and other harms unscrupulous firms and individuals* could inflict on consumers, especially those (such as the elderly) that are particularly vulnerable to *telephone scams*” (NAAG, p. 3, emphasis supplied).

We dispute NAAG’s assertion that FCC approval of the Joint Petition would allow interstate telemarketers to evade state laws and engage in “fraud,” “harassment,” and “scams.”

According to Indiana, the Joint Petition argues that the Communications Act “forecloses enforcement of all state consumer protection laws against fraud and harassment committed by way of interstate telephone calls” (IN, p.2). The Joint Petition makes no such argument, expressly or impliedly, for the simple reason that there is no basis for such an argument, and rightly so.

The sweeping contentions by NAAG and Indiana reflect a basic strategy that reveals itself throughout their comments opposing the Joint Petition: Assert that there is no regulatory or jurisdictional distinction between state do-not-call laws that regulate legitimate telemarketing and state laws against unfair and deceptive acts and practices, and then assert that state police powers, since they obviously apply to the latter, apply as well to the former. This strategy is most clearly revealed in Indiana’s question: “What jurisdictional difference can possibly separate fraudulent sales pitches from honest ones?” (IN, p. 27, fn. 5). If, as Indiana contends, there is no such difference, then state police powers are virtually unlimited. We submit that state

police powers are not unlimited, and that states exceed their jurisdiction when they seek to regulate calling per se, rather than fraud that may or may not involve interstate calling.

## **II. The FCC's Exclusive Regulatory Jurisdiction Over Interstate Telemarketing Is Firmly Established; Arguments To The Contrary Are Not Sustainable**

The Joint Petition (pp. 33-42) sets forth, fully and persuasively, the legislative, statutory, judicial and regulatory justification for the requested ruling that the FCC has exclusive jurisdiction over interstate telemarketing. The comments submitted by Indiana and NAAG do not undermine that justification.

Indiana argues (IN, pp. 6-9) that Congress did not understand either the Communications Act or the TCPA. Specifically, the state argues that Sen. Hollings' oft-quoted statement ("State law does not, and cannot, regulate interstate calls") was wrong, as were the numerous other Congressional statements to the same effect; that the TCPA's finding that "telemarketers can evade [state] prohibitions through interstate operations" was also wrong; that the Commission was wrong in recognizing that "states traditionally have had jurisdiction over only intrastate calls, while the Commission has had jurisdiction over interstate calls"; and, of course, that the Joint Petition is wrong in its interpretation of the word "communication" as used in section 2(a) of the Communications Act. Apparently, a lot of entities must be wrong in their interpretations of the law in order for Indiana's interpretation to be correct.

➤ *Section 2 of the Communications Act.* Indiana argues that "the power to regulate 'interstate communication by wire' is only the power to regulate the means of interstate transmission, not the content of the communication, the conduct of the communication, *or the protection against injuries caused by harassing or fraudulent communications*" (IN, p.8, emphasis supplied). No credible authority is cited to support this very limited definition of "communication," which Indiana admits is only a "theory" (IN, p.13). Moreover, the italicized part of the statement reflects, yet again, Indiana's strategy of lumping legal and truthful interstate telephone communications with fraudulent and deceptive acts and practices committed via the telephone, for the purpose of justifying state regulation of both.

Indiana also argues (IN, p.12) that the *OSPA* decision, far from supporting Joint Petitioners' position as to the scope of the word "communication," is actually "consistent with Indiana's service and facilities' theory," i.e., that section 2 of the Communications Act grants the FCC jurisdiction only over "the provision of services and facilities . . . not over content or the abuse, harassment, and fraud committed against call recipients (IN, p. 13). However, as previously discussed, the Joint Petition does not request the FCC to declare jurisdiction, exclusive or otherwise, over fraudulent, abusive, or harassing telephone calls by interstate telemarketers. Moreover, as we pointed out in our initial comments, the *OSPA* decision was the primary authority cited in the 1998 Matisse-to-Guns opinion letter which stated explicitly that "The Communications Act, specifically section 227 of the Act, establishes Congress' intent to provide for regulation exclusively by the Commission of the use of interstate telephone network for unsolicited advertisements by facsimile or by telephone utilizing live solicitation, autodialers or pre-recorded messages" (ISTP, p.8, fn. 9). We submit that this FCC staff opinion letter, which has never been modified or overruled, is a strong indication of how the Commission, the federal agency responsible for interpreting the Communications Act, views the scope of its jurisdiction and the meaning of "communication".

➤ *Section 227(e) of the TCPA.* Not for the first time in these proceedings, Indiana argues that TCPA section 227(e)(1), captioned "State law not preempted", effectively grants states jurisdiction over interstate telemarketing (IN, pp. 15-19). Specifically, Indiana asserts that section 227(e) "expressly prohibits preemption of *any* state law that *prohibits* telemarketing calls (even as applied to interstate calls). . ." (IN, p. 16). Indiana makes this assertion even though the word "interstate" is nowhere to be found in section 227(e) – or anywhere else in section 227 – and its interpretation of 227(e)(1) is wholly inconsistent with both the clear language of section 2(a) of the Communications Act and the legislative history of the TCPA. Indiana's argument necessarily assumes that Congress, when it enacted the TCPA, abandoned the jurisdictional distinction between intrastate and interstate calls that had been a bedrock



principle of telecommunications law for more than 50 years, and chose to do so by implication, rather than expressly, i.e. by amending section 2(a) of the Communications Act. Moreover, under Indiana's reading of section 227(e)(1)(D), *states can prohibit interstate telemarketing entirely, but cannot otherwise regulate it, as they are doing today*. Indiana does not address the First Amendment and other extraordinary implications of such an interpretation.

➤ *State Police Power.* As previously discussed, Indiana seeks to establish its core arguments primarily by mischaracterizing the goals and arguments of the Joint Petitioners. Nowhere is this more obvious than in its argument that an FCC declaration of exclusive jurisdiction over interstate telemarketing will leave the Commission

. . . . with the responsibility for safeguarding consumers from *all* injuries that can occur by way of an interstate telephone call. That is because, in the [Joint Petitioners'] view, the Commission's power to regulate 'interstate communication by wire' includes the *exclusive* authority to regulate what is said in those communications. And if that is the case, that power applies just as much to fraudulent telemarketing as it does to simply unwanted telemarketing. It applies as much to obscenity as to commercial pitches. And states would be prohibited from enforcing their own laws against any of it where the calls cross state lines. That would mean the scores of enforcement actions cited by the other states, plus untold others, could not again be brought. The result would be a gaping whole (sic) in consumer protection enforcement; the poor and the elderly (among others) would have little recourse when they fall prey to unscrupulous interstate telemarketers." (IN, p. 26)

We reiterate, it is not the position of the Joint Petitioners that the Commission would, or should, assume responsibility for prosecuting "unscrupulous interstate telemarketers" who engage in "fraudulent telemarketing" and "obscenity," and "prey" on the poor and elderly. That will not be the result of the ruling Joint Petitioners seek. Indiana's argument is another attempt to eliminate the distinction between legitimate interstate telemarketing and illegal acts committed via interstate telephone, for the purpose of forcing the Commission to allow the states to regulate both, and to allow states to enforce their telemarketing laws against interstate telemarketers.

## CONCLUSION

The Interstate Sellers and Teleservices Providers listed below, for themselves and on behalf of other companies similarly situated, respectfully request the Commission to declare its exclusive jurisdiction over interstate telemarketing, as requested in the Joint Petition.

Respectfully submitted,

Access Direct Telemarketing, Inc.  
Cedar Rapids, Iowa

Advanced Innovative Marketing  
Emmaus, Pennsylvania

Aegis Communications Group  
Irving, Texas

The Allant Group, Inc.  
Naperville, Illinois

Alliance Healthcare Information, Inc.  
Ivyland, Pennsylvania

American Home Shield Corporation  
Memphis, Tennessee

AmeriMark Direct  
Cleveland, Ohio

ASK Telemarketing, Inc.  
Montgomery, Alabama

Authtel Incorporated  
Kennett Square, Pennsylvania

Comfort Telecommunications, Inc.  
Cape Coral, Florida

Craftmatic Organization, Inc.  
Trevose, Pennsylvania

Cyber City Teleservices, Ltd.  
Hackensack, New Jersey

DirectLine Technologies, Inc.  
Modesto, California

Effective Teleservices, Inc.  
Nacogdoches, Texas

ESI Contact, Inc.  
Etobicoke, Ontario

Expitar  
Miami, Florida

Falzone and Associates, LLC  
Sellersville, Pennsylvania

Global Contact Services  
Salisbury, North Carolina

Hancock Information Group, Inc.  
Longwood, Florida

Harris Connect, Inc.  
Purchase, New York

Humana, Inc.  
Louisville, Kentucky

ICT Group, Inc.  
Newtown, Pennsylvania

Influent, Inc.  
Dublin, Ohio

InterMedia Marketing Solutions  
West Chester, Pennsylvania

Kipany Productions Ltd.  
New York, New York

MDS Communications  
Mesa, Arizona

MPI Outsourcing  
New York, New York

NCO Customer Management, Inc.  
Horsham, Pennsylvania

NOVO 1  
Waukesha, Wisconsin

NPS, LLC  
Indianapolis, Indiana

Optima Direct Inc.  
Vienna, Virginia

Outreach Communications  
Fort Worth, Texas

Personal Legal Plans, Inc.  
Charlotte, North Carolina

Phone Ware, Inc.  
San Diego, California

Power Direct  
Brooklyn, Ohio

Precision Response Corporation  
Plantation, Florida

Progressive Business Publications  
Malvern, Pennsylvania

Protocol Integrated Direct Marketing  
Sarasota, Florida

Results Technologies, Inc.  
Dania, Florida

Ross Marketing, Inc.  
Hiawatha, Iowa

SER Solutions, Inc.  
Dulles, Virginia

ServiceMaster Companies  
Downers Grove, Illinois

Showtime Networks, Inc.  
Addison, Texas

SPH Marketing, Inc.  
Sarasota, Florida

Sun Marketing, LLC  
Phoenix, Arizona

Synergy Solutions  
Phoenix, Arizona

TCIM Services, Inc.  
Wilmington, Delaware

TeleDirect International, Inc.  
Scottsdale, Arizona

Telelytics  
San Francisco, California

The Telemarketing Connection  
Chicago, Illinois

Tel-A-Sell Marketing Inc.  
Cincinnati, Ohio

Terminix International Company L.P.  
Memphis, Tennessee

Trident Marketing International Inc.  
Tampa, Florida

TruGreen Companies L.L.C.  
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United Marketing Group, LLC  
Schaumburg, Illinois

Visions Marketing Services, Inc.  
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**Other Entities Endorsing These Comments:**

American Institute for Cancer Research  
Washington, District of Columbia

CH Consulting  
International Falls, Minnesota

Mortgage Bankers Association  
Washington, District of Columbia

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